Supreme Court, U.S.
FILED
APR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1577

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. FLITCRAFT AND REBECCA A. FLITCRAFT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the counts of the indictment charging that petitioners failed to file income tax returns were constructively amended by the proceedings at trial.

2. Whether a question from the jury about which counts of the indictment referred to which charges requires reversal of petitioners' convictions.

3. Whether petitioners' convictions must be reversed because the government's investigation in this case arose from a charge of juror misconduct in a previous case in which petitioner Rebecca Flitcraft served as a juror.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 863 F.2d 342. The order of the district court (Pet. App. 9a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1988. A petition for rehearing was denied on January 26, 1989 (Pet. App. 8a). The petition for a writ of certiorari was filed on March 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a third jury trial,[1] petitioner Robert Flitcraft was convicted on seven counts of providing false withholding exemption certificates (Forms W-4) to his employers, in violation of 26 U.S.C. 7205, and two counts of failing to file income tax returns for taxable years 1981 and 1982, in violation of 26 U.S.C. 7203. Petitioner Rebecca Flitcraft was convicted on one count of filing a false Form W-4, in violation of 26 U.S.C. 7205, and two counts of failing to file income tax returns for taxable years 1981 and 1982, in violation of 26 U.S.C. 7203. Pet. App. 3a. Petitioner Robert Flitcraft was sentenced to consecutive one-year terms of imprisonment on Counts 1 and 2 (failure to file), to be followed by concurrent five-year terms of probation for each of Counts 3 through 9 (false Forms W-4). Petitioner Rebecca Flitcraft was sentenced to one year's imprisonment on Counts 10 and 11 (failure to file), to be followed by five years' probation on Count 12 (false Form W-4). The court of appeals reversed in part and remanded for resentencing (Pet. App. 2a-7a).

1. Petitioner Rebecca Flitcraft served as a juror in a criminal tax trial in which she provided the lone vote to acquit. That case ended in a mistrial. The jury foreman informed the presiding judge of the possibility of impropriety in the jury's deliberations. The judge then instructed the United States Attorney to investigate the jury deliberations. During the course of its investigation, the government discovered: (1) that petitioners had filed many Forms W-4 with their employers that falsely claimed that petitioners were exempt from tax and (2) that petitioners had failed to file income tax returns for taxable years 1981 and 1982. Pet. App. 3a.

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[1] The first trial ended in a mistrial, and the second trial ended in convictions that were reversed by the court of appeals (Pet. App. 3a).

At trial, petitioners waived the court's reading of the indictment. The prosecutor therefore summarized the indictment for the jury (Pet. App. 4a). The prosecutor explained that Count 1 charged that Robert Flitcraft failed to file an income tax return for 1981 and that Count 2 made the same charge for the year 1982. The prosecutor also informed the jury that Counts 10 and 11 charged Rebecca Flitcraft with the same crimes for the same years (*ibid.*). The prosecutor, however, did not explain the details of the remaining counts, which alleged that petitioners filed false Forms W-4.

During its deliberations, the jury asked for clarification of the charges by sending the following request to the judge:

> Could you please identify the charges by number so that we can separate our votes, please.[2]

Pet. App. 4a. The court suggested sending the indictment to the jury to clear up any confusion. Petitioners' standby counsel objected to that procedure and to every other proposed solution to the jury's confusion (*ibid.*). Petitioner Robert Flitcraft then suggested that the counts be identified by placing "1040" next to the failure-to-file charges and "W-4" next to the charges for the false withholding certificates. The court followed Robert Flitcraft's suggestion (Pet. App. 4a-5a). The jury then found petitioners guilty on all counts.

2. The court of appeals reversed petitioners' convictions for filing false withholding-exemption certificates. The court concluded that it was clear that the jury was confused as to what evidence applied to the various charges of filing false Forms W-4 (Pet. App. 5a). The court noted that the indictment was not read to the jury.

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[2] The verdict form did not describe the counts, but simply listed the counts by number.

Furthermore, the prosecutor's summary of the counts charging the filing of false Forms W-4 did not tell the jury when petitioners were alleged to have filed the false forms or with which employers those forms might have been filed. In the court's view, the remedy selected to eliminate the jury's confusion—designating the counts on the verdict form as "1040" and "W-4"—was not satisfactory (*ibid.*).

The court of appeals, however, affirmed petitioners' convictions for failing to file tax returns. After reviewing the record, the court concluded that the jury knew that each petitioner was charged with failure to file returns in two years—1981 and 1982. The court reasoned that, although the jury might not have known which count applied to which year, the lack of that information was not prejudicial because each petitioner was found guilty on both counts of failing to file income tax returns. The court observed that the evidence on the failure-to-file counts "was crushing" and that no significant extraneous or misleading evidence was before the jury on those counts (Pet. App. 6a). Accordingly, the court of appeals held that the fact "that the jury may not have known which 'guilty' finding written down by their foreman applied to which count is not of significance * * * [as] [t]hey knew that they were finding each defendant guilty of both charged counts of failure to file" (Pet. App. 7a).

Finally, the court of appeals rejected petitioners' argument that the government improperly began this investigation as a result of statements made by petitioner Rebecca Flitcraft when she served as a juror. The court ruled that the government conducted the investigation properly and did not violate Rebecca Flitcraft's Fifth Amendment rights. Pet. App. 7a.

ARGUMENT

1. Petitioners claim (Pet. 9-11) that the indictment was constructively amended by the proceedings at trial. Petitioners assert (Pet. 9) that the indictment was "amended" by the prosecutor's submitting evidence relating to false Forms W-4 that were not charged in the indictment and by the court's submitting a verdict form to the jury that did not describe the charges. That claim does not warrant reversal of petitioners' convictions at issue here—those for failing to file tax returns.

A constructive amendment of an indictment is an alteration of its terms "by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986); see also *Stirone* v. *United States*, 361 U.S. 212, 218-219 (1960). Here, the indictment charged that petitioners willfully failed to file income tax returns for 1981 and 1982. The government did not introduce any evidence tending to show that petitioners failed to file income tax returns for any years other than those charged in the indictment. Moreover, as the court of appeals observed (Pet. App. 6a), the jury knew that each petitioner had been charged with failing to file income tax returns only for 1981 and 1982. Petitioners point to no instruction that might have led the jury to believe that it could convict petitioners for a failure to file a return in any other year. To be sure, the verdict form did not set out the years to which the failure-to-file charges related. But that form also did not suggest that petitioners could be convicted for a failure to file for any year other than 1981 or 1982. Accordingly, the evidence at trial and the jury form did not constructively

amend the charges of failing to file tax returns for the years 1981 and 1982.

2. Petitioners next contend (Pet. 12-14) that their convictions must be reversed because the judge failed to eliminate the confusion indicated by the jury. During its deliberations, the jury requested clarification as to the counts listed on the verdict form. After petitioners' standby counsel objected to every proposed solution, the judge, at the suggestion of petitioner Robert Flitcraft, simply noted which counts related to false Forms W-4 and which related to failing to file tax returns. The court of appeals ruled that the solution chosen by the judge was unsatisfactory for the counts relating to filing false Forms W-4. Nevertheless, as the court of appeals recognized (Pet. App. 6a-7a), the jury was adequately instructed on the failure-to-file counts. The jury knew that both petitioners were charged with failing to file income tax returns for 1981 and 1982. The jury found each petitioner guilty on both counts charging a failure to file. Under those circumstances, petitioners were not prejudiced even if the jury did not know which count on the verdict form applied to 1981 and which applied to 1982.

3. Petitioners lastly contend (Pet. 14-17) that their convictions must be reversed because the government discovered their tax violations as a result of its investigation into charges of juror misconduct at the trial in which petitioner Rebecca Flitcraft served as a juror. They claim (Pet. 14) that the government's questioning of the jurors in the earlier trial about statements made by petitioner Rebecca Flitcraft violated the privilege prohibiting inquiry into a jury's deliberations.[3] There is no merit to that claim.

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[3] Petitioners do not explain why this claimed violation of Rebecca Flitcraft's privilege should be used to reverse the convictions of Robert Flitcraft.

As petitioners recognize (Pet. 15), the rule protecting jury deliberations from disclosure is subject to exceptions. See *Clark* v. *United States*, 289 U.S. 1, 13 (1933). In *Clark*, this Court ruled that to refuse to allow an investigation of jury deliberations where there is a suspicion of juror misconduct or tampering would be "paying too high a price for the assurance to a juror of serenity of mind." *Id.* at 14. Here, the jury foreman at the earlier trial made allegations of juror misconduct. Thus, the government properly followed the presiding judge's instruction and began an investigation into those charges. See *Tanner* v. *United States*, 107 S. Ct. 2739, 2751 (1987) (investigation of juror misconduct permissible if juror testimony limited to extrinsic matters).

Petitioners argue (Pet. 15-16) that the "misconduct" exception to the rule against inquiring into jury deliberations does not apply here because petitioner Rebecca Flitcraft was not ultimately charged with juror misconduct. There is no support for that proposition. As long as the investigation of juror misconduct was properly begun in the first place, there is no justification for a rule that would preclude prosecution for any crimes discovered as a result of that investigation. Cf. *Abel* v. *United States*, 362 U.S. 217, 240 (1960). Moreover, during petitioners' trial, the government did not submit any evidence regarding the prior jury deliberations. Rebecca Flitcraft has not been held to answer for her conduct as a juror or for anything she said during those deliberations. The court of appeals therefore correctly rejected petitioners' argument that the government's investigation was unlawful.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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APRIL 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00225